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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,
Petitioners,

v.

KFC WESTERN, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

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BRIEF *AMICUS CURIAE* OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA

The Petroleum Marketers Association of America (PMAA) respectfully submits this brief *amicus curiae* in support of Alan and Margaret Meghrig in this case. Written consent to the filing of this brief has been obtained from all parties. The original letters authorizing consent have been filed concurrently herewith.

INTEREST OF *AMICUS CURIAE*

The PMAA is a federation of 42 state and regional trade associations representing more than ten thousand small business petroleum marketers.[1/] Together, PMAA members market approximately 46 percent of the gasoline and 75 percent of the home heating oil sold in America. In addition, they supply more than one-half of the Nation's retail motor fuel facilities,[2/] approximately three-quarters of which are operated by independent retailers. PMAA members are primarily composed of jobbers and other wholesale distributors of refined petroleum products, as well as chain retailers that market motor fuels through service station outlets.

In connection with their businesses, PMAA members have purchased and sold tens of thousands of parcels of real property at which petroleum products were stored, distributed, or sold. Because they served as both the vendor and vendee of petroleum-contaminated properties, petroleum marketers have a unique perspective as to the understandings that animated these transactions and the balance of interests that is reflected in the parties' determinations of fair market value. They also have a great deal at stake. At issue is a decision of the Ninth

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[1/] A list of the constituent state and regional trade associations that compose the PMAA is set forth in the Appendix hereto.

[2/] Independent marketers own or lease more than 50,000 retail facilities nationwide and store fuel at more than 10,000 additional "bulk plants." PMAA's 1994 member survey discloses that its members supplied 71,279 of America's approximately 150,000 retail motor fuel distribution outlets (*e.g.*, gasoline stations, truck stops, convenience stores). Their 240,000 full-time employees service this network with roughly 100,000 vehicles.

Circuit Court of Appeals[3/] that exposes petroleum marketers to unlimited liability for the costs of remediating petroleum contamination at properties in which they had an ownership interest at one time or another over a period of decades.

Although PMAA members stand to benefit from the decision below, to the extent they were vendees of petroleum-contaminated property, or to be affected adversely by the decision, to the extent they were vendors, their collective interest is aligned with that of the Meghrigs. For the reasons that follow, the Ninth Circuit's decision in this case, if allowed to stand, would serve to retroactively reallocate the rights and obligations of parties to settled real estate transactions. It would place a cloud over the transactions and jeopardize the viability of many petroleum marketers who may now be called upon to suffer the costs of remediating sites they parted with years ago. The uncertainties created by these contingent liabilities would stifle the business plans of all but the most ambitious marketer; it would unsettle real estate markets for petroleum-related properties, and it would lead to dislocations in an industry in which market stability and predictability are essential to plans for growth.

ARGUMENT

Over the decades, petroleum marketers purchased and sold tens of thousands of properties at which petroleum storage, distribution, or dispensing operations were conducted. An important component in establishing the fair market value of these properties was a set of common understandings as to the risk of exposure of the vendor and vendee to claims arising out of petroleum contamination. These understandings were grounded in

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[3/] The opinion of the Court of Appeals is reported at 49 F.3d 518 (9th Cir. 1995).

certain well-defined rules regarding the liability of property owners to state regulatory agencies, to adjacent property owners, and to successor land owners. The rules emanate from the common law and from the various state statutes that govern petroleum leaks and spills.

The understandings of the vendor and vendee as to the risks and liabilities of property ownership were reflected in the purchase price for the property. Properties sold "as is" or in their "present condition" were conveyed without any warranty as to condition, thus reflecting the intent of the vendor and vendee to allocate the risks of property ownership in the context of determining fair market value. If a vendor sold a contaminated property at an appropriately discounted price, the rules governing real property transactions, including the doctrine of *caveat emptor*, precluded any unbargained-for liability to remote vendees. In this way, the market allocated resources and risks in an orderly climate of well-defined rights and responsibilities.

The decision of the Ninth Circuit in this case imputes to Congress an intent to retroactively reallocate the rights and obligations of parties to real property transactions without regard to the understandings on which the transactions were based. By interpreting the citizen suit provision of the Resource Conservation and Recovery Act (RCRA)[4/] to authorize a private right of action for money damages, albeit in the form of "equitable restitution," the court created a remedy so broad in scope as to effectively preempt the more limited state remedies and defenses which had heretofore governed the parties' actions. The ultimate consequence of the ruling is enormous. It calls into question the understandings on which thousands of bargained-for transactions were grounded and subjects them to scrutiny on the basis of rules that were never imagined when the parties set out to define their respective obligations.

[4/] 42 U.S.C. § 6972(a)(1)(B).

The decision of the Ninth Circuit rests on the notion that Congress intended these consequences notwithstanding the absence of any explicit reference in RCRA's citizen suit provision to a private right of action for money damages. It construed the language "to take such other action as may be necessary" to include the full range of equitable remedies, including "restitution," to be targeted, in the absence of a statute of limitations, to each vendor in the chain of title.

For the reasons that follow, the presumption that Congress had the will to effect such enormous change cannot be based on so little in the way of evidence of congressional intent. Indeed, it is clear that the decision of the court below rested not on evidence of congressional intent, but on a conclusion that "public policy concerns" favor a restitutionary remedy. It is not the role of the federal courts, however, to "engraft a remedy on a statute, no matter how salutary, that Congress did not provide." *California v. Sierra Club*, 451 U.S. 287, 298 (1981) (White, J.).

A. The Ninth Circuit Erred in Failing to Apply the Precedents of this Court that Establish Standards for Implied Rights of Action

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court set out four standards for determining whether a private right of action exists in a statute. They are: (i) whether the plaintiff is in the class for whose benefit the statute was enacted, (ii) whether the legislative history evidences an intent to create a cause of action, (iii) whether the proposed remedy is consistent with the statutory scheme, and (iv) whether the cause of action is one traditionally a matter of state law. In later decisions, the Court restructured the inquiry, stating that congressional intent is the determinative factor, and that the other three are indicative of its presence or absence. *Touche Ross & Co. v. Reddington*, 422 U.S. 560, 575-576 (1979); *TransAmerica Mortgage Advisors,*

Inc. v. Lewis, 444 U.S. 11, 18 (1979). The central focus of the inquiry, therefore, is whether Congress intended to create a remedy.

The focus of the decision below is not on congressional intent. On the contrary, it assumes that congressional intent is evident in an explicit authorization for courts "to take such other action as may be necessary," which the court construed as including equitable remedies such as restitution. In effect, the Ninth Circuit concluded that it was not recognizing an implied right of action; rather, it was giving effect to an express right of action for restitutionary relief.[5/]

In order to accomplish this result, the court indulged in two assumptions, neither of which was subjected to even a cursory analysis. First, the court agreed with KFC that "its damages claim was actually a claim for 'equitable restitution.'" *KFC v. Meghrig*, 49 F.3d 518, 519 (9th Cir. 1995). Second, it concluded that an equitable remedy, such as restitution, is merely an adjunct to the type of injunctive relief that is indisputably authorized by the statute and encompassed in the language "such other action as may be necessary . . . ." This assumption was necessary to conform the remedy to what Congress clearly intended as the "equitable authority of Section 7003." *H.R. Rep. No. 98-198*, 98th Cong., 2d Sess., 48 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5607. As will be developed more fully below, however, neither of these assumptions is valid.

[5/]The approach taken by the court below stands in stark contrast to the one applied by the Eighth Circuit Court of Appeals in *Furrer v. Brown*, 62 F.3d 1092 (8th Cir. 1995), which examined the identical issue. The Eighth Circuit applied the factors set out in *Cort v. Ash* and concluded that RCRA does not authorize a private right of action for monetary remedies.

1. The Court Below Did not Fashion a Restitutionary Remedy; it Authorized a Private Right of Action for Money Damages

Restitution is an equitable remedy that attempts to restore a plaintiff to the position it would have been in had there been no wrongful act committed by the defendant. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). The remedy is restorative in nature; on the basis of equitable principles, it attempts to reimburse the plaintiff for what was unlawfully acquired from him. The most distinctive feature of restitution is that liability is based on, and recovery is usually measured by, benefit to the defendant rather than harm to the plaintiff.[6/] In short, restitution is based upon the gains to the defendant which would be unjust for him to retain.[7/]

The remedy imposed by the court below is more mechanical in its approach than anything that can be characterized as restitutionary. It requires any party who contributed in the past to a current endangerment to reimburse the plaintiff for the costs of cleaning up a site. Damages are measured by the amount of the plaintiff's costs of remediation; there is no attempt to determine whether the defendant was unjustly enriched or whether a reimbursement in the amount of the remediation costs would restore the *status quo ante*.

Assuming that the wrongful act of the defendant is its contribution to the endangerment, the aggregate of the plaintiff's clean-up costs may be greater than necessary to restore the plaintiff to the position it would have been in had the wrongful act not occurred. Were the property not contaminated, the plaintiff may never have been in a

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[6/]Douglas Laycock, *Modern American Remedies*, 462.

[7/]John F. O'Connell, *Remedies*, 72.

position to purchase it. Clearly, the range of options available to a vendor of clean property is significantly greater than would be the case if the property were polluted with petroleum hydrocarbons. More than likely, the price at which the plaintiff purchased the property would have been greater in the event the property were clean at the time of sale. Assuming for the moment that the purchase price for the property was discounted by the estimated amount of clean-up costs, reimbursement in the manner prescribed by the court below would unjustly enrich the plaintiff, KFC.

Moreover, "[b]uyers of contaminated land, unlike the victims of negligent acts, are in a position to protect themselves through contract or by refusing to conclude a transaction." *Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 956 (R.I. 1994). A prospective buyer, for example, "can bargain with the seller for security or indemnity against unknown defects." *Wilson Auto Enterprises, Inc. v. Mobil Oil Corp.*, 778 F. Supp. 101, 105 (D.R.I. 1991). Even where no security is obtained by the buyer, and there is no reduction in the purchase price, the property may have a value to the buyer that is far in excess of its fair market value. Whether reimbursement is equitable, therefore, and whether the vendor has been unjustly enriched as a result of remediation by the vendee, it is subject to numerous market-based and other policy considerations, among which is whether a vendee who purchases property after a satisfactory inspection assumes all risk of liability from petroleum contamination.

The Ninth Circuit did not, however, appear concerned with the intricacies of fashioning a truly restitutionary remedy. Its conception of the remedy envisioned by Congress is one in the nature of indemnity. *See KFC*, *supra*, at 524. ("[T]he innocent private party, like KFC, who purchases already-contaminated property, often must clean the property immediately and recover secondarily from the actual polluter"). Its aim is narrow; that is, to compensate the vendee for the costs of remediation on the

assumption that a "right to reimbursement" would encourage prompt cleanups.[8/] As such, it is functionally no different from compensatory damages.

2. The Citizen Suit Provision of RCRA Was not Intended by Congress as a Private Right of Action for Damages

The RCRA citizen suit provision provides in pertinent part that:

> The district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in [§ 6972(a)(1)(B) (the endangerment provision)] [and] to order such person to take such other action as may be necessary, or both . . . .

42 U.S.C. § 6972(a).

In construing the "such other action as may be necessary," language to include a private right of action for damages, the court below crafted a broad-based remedy that effectively abrogates the various defenses available to the defendant under the common law. Thus, the court has created a "super remedy" that supersedes and renders meaningless the traditional common law remedies available to a vendee against the vendor of real property. Congress could not have intended to create such a remedy and, at

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[8/] *See* 49 F.3d at 524. ("The right to reimbursement becomes important to the Administrator only when contamination requires prompt attention, which is always the case for private citizens who are ordered to remedy contamination.").

the same time, to preserve state law remedies as an adjunct to the equitable remedies available under RCRA.

In RCRA, Congress inserted a savings clause which preserves a person's rights "under any statute or common law . . . to seek any other relief." 42 U.S.C. § 6972(f). The legislative history of the 1984 amendment to § 6972 reflects the awareness of Congress that these state law claims would be instituted in conjunction with a citizen's suit under RCRA to abate an imminent hazard.[9/] In fact, the legislative history of the 1984 amendment suggests a congressional awareness that the state and federal actions would be instituted in tandem, the federal action for injunctive relief to abate the endangerment and the state causes of action to seek reimbursement for the losses associated with petroleum contamination.[10/] In any event, the congressional assumptions evident in the legislative history would make no sense if the citizen's suit provision were interpreted to include the private damage remedy envisioned by the Ninth Circuit. For the reasons set forth below, the state remedies would be useless surplusage in relation to the more potent federal cause of action.

Where, as here, a vendee sues the vendor of real property, common law defenses are often available to bar the claim. In jurisdictions that adhere to the doctrine of *caveat emptor*, a seller cannot be held responsible for defects, such as petroleum contamination, existing in the

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[9/] *H.R. Rep. No. 98-198*, 98th Cong., 2d Sess., 48 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

[10/] *See id.* ("Although the Committee has not prohibited a citizen from raising claims under state law in a Section 7002 action, the Committee expects courts to exercise their discretion concerning pendent jurisdiction in a way that will not frustrate or delay the primary goal of this provision, namely the prompt abatement of imminent and substantial endangerments.").

property at the time of sale.[11/] Nor would such defects afford the purchaser a basis to resist an action for specific performance of the sales contract, *Feldman v. Rucker*, 109 S.E.2d 379 (Va. 1959) or, absent an attempt by the seller to prevent discovery of the defects, to seek recision. *Boris v. Hill*, 375 S.E.2d 716 (Va. 1989). The same result would obtain where the buyer attempts indirectly to circumvent the rule, such as by claiming that the defects were the result of the seller's negligence, *Hydro-Manufacturing*, *supra*; *Wilson Auto Enterprises*, *supra*, or where the purchaser claims that the defects have resulted in a private nuisance. *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, 737 F. Supp. 1272, 1282 (W.D.N.Y. 1990), *aff'd*, 964 F.2d 85 (2d Cir. 1992). This is also true where the vendee of real property seeks compensation for remediation expenses from the vendor on a theory of common law indemnity. *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303, 318 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985) ("The same policy considerations that counsel adherence to the rule of *caveat emptor* in this situation militate against shifting the loss to Hercules on an indemnity theory."). *See also, e.g., Smith Land & Improvement Corp. v. Rapid-American Corp.*, 18 Envtl. L. Rep. 20, 769 (M.D. Pa. 1987). Common law remedies are also susceptible to being barred by the applicable statutes of limitations and repose.

The remedy envisioned by the Ninth Circuit is immune to these defenses. The court below authorized relief in the form of money damages in a suit by a vendee against the vendor of real property without regard to *caveat emptor* and any statute of limitations.[12/] *KFC*, *supra*, at 522-

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[11/] Milton Friedman, *Contracts and Conveyances of Real Property* § 1.2(n) (4th ed. 1984) and cases cited therein.

[12/] The Ninth Circuit does not see the lack of any limitations period "as a problem." 49 F.3d at 522-523. In addressing this issue,

(continued...)

523. In short, it imputed to Congress an intent to create a super remedy that imposes strict liability on any party contributing to an endangerment, irrespective of negligence or other actionable conduct, and one that is not susceptible to the traditional common law defenses. Moreover, by characterizing the remedy as one sounding in restitution, the court below did not foreclose the possibility that restitution could go beyond compensation for clean-up costs and extend to other areas, such as lost profits or other business-related damages.

Because the remedy made available to KFC is significantly more potent than anything available at common law, or under state statutes that are subject to a statute of limitations, it is unlikely that private litigants would rely on the traditional common law remedies. It is unlikely, therefore, that Congress made a point of preserving state law only to create a remedy that effectively supersedes it.[13/]

It is even more unlikely that Congress could have intended a remedy that is such a marked departure from existing law in the absence of some explicit reference in the statute or in the legislative history. Indeed, the legislative history indicates a contrary intention. Congress could not have characterized the citizen's suit provision as

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[12/](...continued)
it concluded that "[b]y applying equitable defenses such as *laches*, courts can alleviate any unfairness that might be created by the lack of a limitations period for RCRA citizens' suit." *Id.* In substance, the court below construed congressional intent to permit the courts unlimited discretion to determine the reach of the remedy it created on a case-by-case basis.

[13/]It is assumed, of course, "that Congress is aware of existing law when it passes legislation." *Director, UWCP v. Perini North River Assoc.*, 459 U.S. 297, 319-320 (1983); *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979).

conferring "a limited right . . ."[14/] to sue and, at the same time, to have envisioned a super remedy that broadens the rights of vendee-litigants beyond anything recognizable at common law.

As the Eighth Circuit concluded in *Furrer*, referring to the explicit provision contained in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[15/] Congress would have included an express provision in RCRA authorizing contribution or indemnity if such were its intent:

> Congress, knowing its CERCLA citizen's suit provision, did not extend the available remedies to include a cause of action for monetary recovery from other responsible parties, despite the broad "other action" language (which is also found in the RCRA citizen's suit provision), and wishing to allow such a remedy in certain cases, enacted § 9613(f)(1) to provide expressly for contribution.

62 F.3d at 1096-97. On the basis of the foregoing, there is no reason to believe that Congress would not have been equally as clear had it desired to create a CERCLA-type remedy in RCRA.

[14/]*H.R. Rep. No. 98-198*, 98th Cong., 2d Sess., 48 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5612.

[15/]42 U.S.C. §§ 9601-9675.

B. The Ninth Circuit's Decision in this Case Establishes a Dangerous Precedent; it Authorizes Courts to Vindicate Their Value Preferences through Judicial Legislation

There can be no question that the lower court's preference for reading so much into so little was animated by a desire to further public policy as the court sees it. Thus, it fashioned a remedy aimed at encouraging the prompt remediation of contaminated sites, stating that "public policy concerns might favor allowing a plaintiff to clean contaminated property first and seek reimbursement later." *KFC*, *supra*, at 524. The court's desire to expedite the remediation of contaminated properties, however, should not have been the principal focus of its inquiry. The focus of the inquiry is on whether Congress intended to create a remedy. *Touche Ross*, 442 U.S. at 575. "When Congress chooses not to provide a civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Cannon*, 441 U.S. at 730-731 (Powell, J. dissenting).

While courts routinely derive implications from statutory language, the well-recognized dangers of such implications are greater when a private right of action is inferred. The ramifications of the court's decision to infer a right of action go far beyond the applicable factual record and, thus, the court's decision is far more legislative in character than one involving the interpretation of an ambiguous statutory provision. The instant case presents a classic example of the dangers inherent in such a process, dangers that stem from the court's indifference to the myriad implications of its decision. These implications, especially as they regard petroleum marketers, are far-reaching and profound.

As stated above, the decision of the court below will retroactively alter the nature of transactions involving tens of thousands of parcels of real property. With the benefit

of hindsight, it attempts to inject into these transactions contemporary notions of fairness without regard to the market factors on which the transactions were based. It exposes thousands of vendors of real property to unbargained-for liability to remote vendees many years after the sales of property were concluded, and seriously threatens the viability of many of them.

The Ninth Circuit's decision was rendered in the absence of any analysis of these implications and without regard to the efforts of Congress and the state legislatures to actively seek a socially acceptable definition of rights and liabilities in the area of environmental contamination. Congress has played its part in attempting such a balance through the enactment of comprehensive statutory schemes that explicitly define the rights and obligations of parties in the circumstances presented here. The decision below, if not reversed by this Court, will significantly alter the balance and encourage other courts to do the same.

CONCLUSION

For these reasons, the PMAA respectfully urges this Court to reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

Amicus Curiae, Petroleum Marketers Association of America, is a non-profit trade association comprising the following associations:

Arizona Petroleum Marketers Association
Arkansas Oil Marketers Association, Inc.
California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Empire State Petroleum Association
Florida Petroleum Marketers Association
Fuel Merchants Association of New Jersey
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Independent connecticut Petroleum Association
Independent Oil Marketers Association of New England
Indiana Oil Marketers Association, Inc.
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Maine Oil Dealers Association
Michigan Petroleum Association
Mid-Atlantic Petroleum Distributors Association, Inc.
Minnesota Petroleum Marketers Association
Mississippi Petroleum Marketers Association
Missouri Petroleum Marketers Association
Montana Petroleum Marketers Association
Nebraska Petroleum Marketers, Inc.
Nevada Petroleum Marketers Association
New England Fuel Institute
New Mexico Petroleum Marketers Association
North Carolina Petroleum Marketers Association
Ohio Petroleum Marketers Association
Oklahoma Petroleum Marketers Association
Oregon Petroleum Marketers Association
Pennsylvania Petroleum Association, Inc.
Petroleum Marketers Association of Wisconsin, Inc.

Petroleum Marketers of Iowa
South Carolina Petroleum Marketers Association
South Dakota Petroleum Marketers Association
Tennessee Oil Marketers Association
Utah/Western Petroleum Marketers Association
Virginia Petroleum Marketers Association
Washington Oil Marketers Association
West Virginia Petroleum Marketers Association
Wyoming Petroleum Marketers Association